



EARTHJUSTICE

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SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

November 17, 2006

Dean K. Dunsmore
United States Department of Justice
Environment and Natural Resources Division
801 B Street, Suite 504
Anchorage, AK 99501-3657

Dear Mr. Dunsmore:

I am writing on behalf of Southeast Alaska Conservation Council, Alaska Public Interest Research Group, Skagway Marine Access Commission, Sierra Club, and Natural Resources Defense Council. On their behalf, I request that you take immediate steps to ensure that the Federal Highway Administration (FHWA) acts to prevent violations of federal regulations by the Alaska Department of Transportation and Public Facilities (DOT) in connection with the advertisement and imminent bid opening for the Juneau Access Project.

On November 15, DOT announced its intention to open bids and award a contract to begin construction of the Juneau Access Project. DOT has issued an addendum to the existing contract advertisement in which it seeks bids for construction of a pioneer road, including temporary bridges, north from Echo Cove. By so doing, DOT has violated federal regulations and contravened FHWA's authorization to proceed with construction. FHWA must exercise its oversight authority and ensure that the State complies with the appropriate regulations and guidelines. As it has done throughout this process, FHWA must prohibit the State from opening bids or entering into a contract until it obtains a Section 404 permit from the Army Corps of Engineers.

On May 31, 2006, FHWA signed a project authorization allowing DOT to advertise a contract for a portion of the Juneau Access Project. The authorization allows for construction of 23.4 miles of highway from Echo Cove to Sweeney Creek and includes 8 major bridges. In granting the authorization, FHWA specifically stated that DOT "was approved to advertise, but not award, this contract until all permits . . . are in hand." DOT then put the contract out for bid with an estimated cost of \$80-90 million.

Over the next several months, DOT issued a series of addenda changing the bid opening date because it had not yet received a Section 404 permit for the project. In the first of those addenda, issued June 29, 2006, DOT added a provision to the contract standards which stated explicitly, "Bids will not be opened until at least seven (7) days after the Department has received" a Section 404 permit. The fifth addendum changed the bid opening date to November 30, 2006. DOT applied for a Section 404 permit in March 2006, and that application has proven contentious, even prompting two letters from the Environmental Protection Agency expressing

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significant concern over the mitigation measures and potential impacts associated with issuing the permit. At this time, DOT has not received a Section 404 permit, and there is no guarantee that it will obtain one.

Nonetheless, DOT issued a sixth addendum to the contract advertisement which moves the bid opening date up eight days to November 22 and dramatically changes the scope of the project. DOT now has advertised a contract to construct a pioneer road and temporary bridges from Echo Cove around Berners Bay. DOT estimates that this contract will cost between \$30-40 million.

In the course of our correspondence yesterday, November 16, you made it clear to me that FHWA has not approved the new addendum or the new scope of the bid advertisement. Without such approval, DOT has violated several federal regulations by putting this contract out for bid and would violate other regulations if it proceeds to award a contract.

First, FHWA regulations require that “[t]he advertisement and approved plans and specifications shall be available to bidders a minimum of 3 weeks prior to opening of bids except that shorter periods may be approved by the Division Administrator in special cases when justified.” 23 CFR § 635.112(b). This project will be advertised for approximately one week before bids are opened. As you made clear, FHWA did not authorize a shortened advertisement period.

Second, the regulations specifically require a state department of transportation to “obtain the approval of the Division Administrator [of FHWA] prior to issuing any addenda which contain a major change to the approved plans or specifications during the advertising period.” 23 CFR § 635.112(c). Clearly, dramatically altering the advertised project’s scope and cost constitutes a major change to the advertisement. Again, since FHWA did not authorize this addendum, DOT violated the regulation by issuing it.

Moreover, DOT cannot award this contract without running afoul of two additional regulations. DOT must “formally request concurrence by the Division Administrator [of FHWA] in the award of all Federal-aid contracts.” 23 CFR § 635.114(b). Similarly, FHWA has specifically required that “[n]o work shall be undertaken on any Federal-aid project . . . prior to authorization by the Division Administrator [of FHWA].” 23 CFR § 112(a). Thus, DOT will violate these regulations by entering a contract without FHWA’s concurrence.

These regulations are applicable even if DOT intends to fund this phase of the project solely with state money. The pioneer road and temporary bridges are part of the larger Juneau Access Project, which has involved federal funding and oversight at every stage.

DOT could not construct this pioneer road as an independent state project. It has not obtained a right-of-way across the Tongass National Forest for such a road. Indeed, it could not obtain a right-of-way for a pioneer road around Berners Bay because the Tongass Timber Reform Act

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would preclude the Forest Service from granting it. Moreover, DOT has not applied for a Section 404 permit from the Army Corps of Engineers or undertaken the analysis required by the National Environmental Policy Act for such a project.

Thus, DOT cannot build this pioneer road independent of the Juneau Access Project. The only way it can advertise or award a contract is as part of the larger, federal project. DOT, therefore, must comply with the regulations described above.

Ultimately, DOT's actions here speak to a last desperate attempt to commit the State to the outgoing administration's unrelenting desire to construct this road extension at all costs. Regardless of the political maneuverings from the current governor, FHWA must ensure that its rules and regulations are followed. Accordingly, FHWA must take immediate action to preclude the state from advertising or awarding a contract in this manner.

Sincerely,

A handwritten signature in cursive script that reads "Michael Levine". The signature is written in dark ink and includes a long horizontal stroke at the end.

Michael Levine
EARTHJUSTICE